

ample evidence on which the learned Magistrate based his finding that the copies of the cassette tapes referred to in the charges were pirated copies. At any rate, the point in issue is not whether the tapes are not the tapes of the owner of the copyright in the record, but whether the records of the songs in the tapes are pirated copies, *i.e.* copies made or reproduced without the consent of the owner of the copyright in the record.

Lastly, it was argued that the learned Magistrate erred in his finding that the seized tapes were in the possession of the appellants. It was not disputed that at the material time the appellants were partners of the business carried on at 6C, Golden Wall Flatted Factory, Jalan Rajah and the 2nd appellant was the person responsible for the management of the partnership business. The pirated copies were found either in the business premises or in the container parked just outside the premises at a loading bay. When the police raided the business premises the 1st appellant identified himself as the person in charge at the premises and he had the key to the container and he opened the container. He told PW 2 that the tapes which were then being seized were for export. In my view, on the totality of the evidence the learned Magistrate was justified in his finding that the pirated copies were in the possession of the appellants for sale at the material time.

In the result, I dismiss the appeal of the appellants and affirm the convictions and sentences.

Appeal dismissed.

Solicitors: *R.C.H. Lim & Co.*

A MALAYSIAN REPORTS

LIAN FOONG HOUSING DEVELOPMENT (M) SDN. BHD. v. TOYO TEXTILES INDUSTRIES SDN. BHD. & ANOR.

[S.C. (Salleh Abas L.P., Seah & Syed Agil
Barakbah S.C. JJ.) December 5, 1985]

[Kuala Lumpur — Supreme Court Civil Appeal
No. 251 of 1985]

Torts — Nuisance and trespass — Interference of natural stream by defendants — Causing flooding and water-logging to plaintiff's land — Question of liability.

Damages — Quantum — Assessment and principles — Remedial measures — Deposit in court by defendants.

This was an appeal from the decision of Shankar J. in [1986] 1 M.L.J. 412. The Supreme Court dismissed the appeal in respect of liability and set aside the judgment of the High Court in respect of quantum on terms as set forth in the Order of Court dated December 5, 1985 reproduced below.

SUPREME COURT.

Dato' Kam Woon Wah (T. Kuhanandan and Kam Tai Keong with him) for the appellant.

Gary Yuen for the respondents.

ORDER

THIS APPEAL coming on for hearing on the 5th day of December, 1985 in the presence of Dato' Kam Woon Wah (Mr. T. Kuhanandan and Mr. Kam Tai Keong with him) of Counsel for the Appellant and Mr. Gary Yuen of Counsel for the Respondents *AND UPON READING THE RECORD OF APPEAL* filed herein *AND UPON HEARING* Counsel as aforesaid *IT IS HEREBY ORDERED* that the Appeal in respect of liability be and is hereby dismissed *AND IT IS FURTHER ORDERED* that in respect of quantum the Appeal be and is hereby allowed as follows:

- 1) the Order of the trial judge that the Appellants pay the Respondents the sum of \$94,500.00 which is three-quarters of M\$126,000.00 as damages for loss of use be and is hereby set aside;
- 2) the Order of the trial judge that the Appellants do deposit in Court *or* to furnish a bank guarantee in terms acceptable to the Respondents for the sum of \$450,000.00 which will be held in reserve until such time as the decision of the Court is rendered on the final estimates for the costs of remedial measures be and is hereby set aside;
- 3) that the Appellant do pay the Respondents a total sum of M\$108,750.00 which is three-quarters of M\$145,000.00 as damages;

AND IT IS ALSO ORDERED that the Appellant do pay the Respondents interest at the rate of 4% per annum from the date of filing of this suit until the date of payment *AND IT IS ALSO FURTHER ORDERED* that each party

bears his own costs in respect of this Appeal only *AND IT IS LASTLY ORDERED* that the sum of \$500.00 deposited into Court by the Appellant as security for costs of this Appeal be refunded to the Appellant.

GIVEN under my hand and the Seal of Court dated this 5th day of December, 1985.

Sd. Soo Ai Lin
Senior Assistant Registrar
Supreme Court Malaysia
Kuala Lumpur

Solicitors: *Syarikat Kam Woon Wah; Arthur Lee & Co.*

LAI SOON CHEONG v. KIEN LOONG HOUSING DEVELOPMENT SDN. BHD. & ANOR.

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) February 27, 1986]

[Kuala Lumpur — Supreme Court Civil Appeal No. 338 of 1985]

Land Law — Agreement for purchase of land and house with housing developer — Condition that vendor shall not without prior approval of purchaser subject the land to any other further encumbrance — Vendor charging the land without approval of purchaser — Foreclosure proceedings instituted by chargee — Application for specific performance of sale and purchase agreement — Application for injunction to restrain respondents from proceeding with sale of land — Allegation of fraud to defeat indefeasible title of chargee — Application for interim injunction allowed.

In this case the appellant had entered into a sale and purchase agreement with the first respondent, a housing developer, for the purchase of a house for \$163,910 and had paid a total sum of \$74,410 towards the purchase price. It was provided in the agreement that after the execution of the agreement the vendor shall not without the prior approval of the purchaser subject the land to any further encumbrance. The first respondent, however, charged the land to the second respondent. When the first respondent failed to repay the loan to the second respondent, the second respondent instituted foreclosure proceedings and the Senior Assistant Registrar of the High Court directed the sale of the land. The appellant applied (a) for an order of specific performance of the sale and purchase agreement (b) for an injunction to restrain the respondents from proceeding with the sale of the land and (c) for a declaration that the charge registered was void wholly or in respect of the lot agreed to be sold to the appellant. The appellant applied for an interim injunction to restrain the respondents from selling the land by public auction. The learned judge dismissed the application. The appellant appealed.

A Held, allowing the appeal: in this case the appellant had a perfectly legitimate right to pursue his remedy. He has paid a substantial sum of the purchase price. He has also alleged fraud and has set out particulars of the fraud allegedly perpetrated against him by the first and second respondents and he seeks to defeat the indefeasible title of the second respondent on these grounds. He is also asking for specific performance of the sale and purchase agreement against the first respondent. In the circumstances he should be allowed an opportunity to prove his allegations.

B Cases referred to:

- (1) *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 M.L.J. 81.
(2) *Public Finance Bhd. v. Narayanasamy* [1971] 2 M.L.J. 32.

SUPREME COURT.

C. Abraham (David Morais and K. Chandran with him) for the appellant.

Tan Bu Kian for the respondent.

H Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): The first respondent is a housing developer. On May 4, 1981 the appellant having paid a total sum of \$74,410.00 towards the purchase price of a house (\$163,910.00) entered into a sale and purchase agreement with the first respondent in respect of land Lot No. 4042 under Document of Title No. H.S.(D) B/P 56/80 in the Mukim of Ulu Bernam Timur. Clause 16 of the agreement states expressly that after the execution of the agreement the vendor *shall not without the prior approval of the purchaser* subject the said land or the said lot to any further encumbrance other than those already subsisting on the date of agreement if any. At the material time the whole land was already charged to Magnum Finance Berhad under Presentation No. 8062/80, Jilid 964, Folio 4 and registered on May 24, 1980. On February 3, 1982 the second respondent paid Magnum Finance Berhad the redemption sum of \$1,168,792.70 to obtain the documents of title and the first respondent then executed a charge in favour of the second respondent which was registered on February 11, 1982 vide Presentation No. 2052/82, Jilid 1219, Folio 38. Subsequently a second charge was created by the first respondent on the same land including Lot 4042 in favour of the Development and Commercial Bank Berhad vide Presentation No. 6466/82 Volume No. 1253, Folio No. 47 registered on April 20, 1982. When the first respondent failed to repay the loan to the second respondent after the statutory demand made in Form 16E of the